No. 89-1782

In The

Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Does State action to deny benefits provided under state law to a government based upon the racial character of the citizens of that government raise a federal law question for the purposes of invoking federal court jurisdiction?

2) May Congress extend recognition to an Indian tribe?

3) May an Indian tribe bring suit against a State in its own right where the Federal government could have brought suit to protect the tribe's rights?

LIST OF PARTIES

PETITIONER:

David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska

RESPONDENTS:

Circle Village
Native Village of Noatak

OTHER PLAINTIFFS IN THE PROCEEDINGS BELOW:

Native Village of Akiachak

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Circle Village respectfully requests the Court to deny the petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Native Village of Noatak v. Hoffman,* 896 F.2d 1157 (9th Cir., 1990) for the reasons stated herein.

STATEMENT OF THE CASE

The Native village of Circle is a small Athabascan Indian village located on the left bank of the Yukon River 130 miles Northeast of Fairbanks at the end of the Steese Highway. Contrary to the Petitioner's claims, Circle was the "retirement" village of the last great paramount chief of the G'within Athabascan Indians, She-na-tee. She-na-tee was a powerful trade chief, and consequently, non-Native traders established a trading post at the site in the late 1800's. While there is some disagreement between Native and non-Native history of the Village's origin, there is no dispute that until his death, river steamers would sound their horns in tribute to She-na-tee when they passed by Circle.

Today the village has a population of about 80 persons, of whom 60 are tribal members. Approximately 2/3 of the tribal members reside in Circle. The non-Native population is primarily composed of school personnel, traders, and utility operators.

The village is governed by a traditional Native village council elected by the tribal membership. The tribe has sought reorganization of its government under the terms of the Indian Reorganization Act [25 USC § 476] (IRA) and is expected to hold an election on the issue this fall, however, at the time this case arose, the village was still operating under it interim provisional constitution. While the village does not have a reservation, the vast majority of individually owned land in the village is made up of Native allotments or Native townsite lots, the title to which are restricted by the United States government. The tribal government operates a health clinic,

community center, and a variety of other services either directly or through a consortium tribal agency in cooperation with surrounding tribes. The village was recognized in the Alaska Native Claims Settlement Act [43 USC §§ 1601-1628] (ANCSA) and operates a village profit corporation which holds title to the tribe's land and cash settlement under the terms of that Act.

For a number of years, the State of Alaska has operated a state revenue sharing program. Under the program, the State has provided financial assistance to local governments. The program provides general assistance funds as well as designated funds for specified purposes to municipal governments in Alaska.

In 1980, the Alaska legislature enacted an amendment to the State revenue sharing program providing general assistance to "Native Village governments" A.S. 29.89.050. The statute defined the term "Native village government" to only include governments organized under the terms of the IRA and traditional village councils, or paramount chiefs for villages recognized under ANCSA. In 1981, the Attorney General for the State of Alaska issued an opinion which declared the State statute unconstitutional based upon the fact that "Native village governments" were racially defined organizations and that state support for such organizations was violative of both the State and Federal constitutions. Rather than closing out the program altogether, the opinion suggested that the statute could be rewritten by administrative interpretation to be constitutional by expanding the class of beneficiaries to include service organizations for non-Native communities not otherwise receiving benefits

under the State revenue sharing program. Based upon this opinion, the petitioner did exactly that.

In 1982, the petitioner redirected the funds for Circle to a non-profit corporation organized and controlled by the non-Native population of Circle (approximately 20% of the village residents). In 1984, after some protest, the petitioner split the funds for Circle: 50% going to the Native Village Council (representing 80% of the village) and 50% going to the non-profit organized and controlled by the non-Native residents of Circle. At trial the tribe is prepared to affirmatively demonstrate that the hearing officer for the petitioner was motivated by racial contempt for the ability of the Natives to administer state funds.

In 1985, the Legislature amended the statute to be consistent with the A.G.'s opinion based upon the legal advice of the A.G. that the prior enactment was unconstitutional. In that year, Circle as well as the village of Noatak brought suit in Federal District Court challenging petitioner's action as violative of federal anti-discrimination laws and other federal laws and policies intended to promote tribal self-government. The District Court dismissed the matter, finding the absence of a federal question. The District Court, while not reaching the issues, suggested that neither village was an Indian tribe under federal law, and that the Eleventh Amendment would be a bar to the action.

On appeal to the Ninth Circuit, the Court held that (1) both Circle and Noatak are Indian tribes for the purposes of 28 UCS § 1362 (providing for federal court jurisdiction over matters brought by an Indian tribe); (2)

that the sovereign immunity of the state of Alaska does not bar the instant action, and (3) that alternative basis of federal court jurisdiction existed in the allegations that the Petitioner's actions violated federal anti-discrimination laws and other federal laws and policies intended to promote tribal self-government.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly ruled that Congress may recognize Indian tribes and has done so with regards to the Native Village of Circle. The well established principles of federal Indian law direct that Congress has plenary authority over the affairs of Indians, which include the power to extend political recognition to Indian tribes. Such actions are political actions not usually subject to judicial review or at least entitled to great deference. Congress has extended such recognition to Circle under ANCSA and other statutes.

Additionally, the Court's ruling respecting the State's sovereign immunity is equally well grounded upon the rulings of this Court. The State's immunity does not extend to bar a suit by the federal government, and equally does not bar a tribe when the tribe brings suit on a claim for which the federal government could have brought the claim.

Finally, there can be no serious argument that racial discrimination states a federal cause of action. Recent decisions by this Court hold that questions of mixed federal and state law questions regarding federal Indian law state a federal cause of action.

The Petitioner grossly overstates the impact of the decision from a national perspective. The case does not open avenues of litigation against States by Indian tribes which did not exist before. In fact, as this Court is very much aware, litigation between Indian tribes and states is very common. Although, the decision clarifies tribal status of Alaskan tribes, it does not either change established rules governing recognition of tribes and at most only applies to tribes in Alaska. Consequently, Circle Village respectfully requests the Court to deny the petition.

I. THE COURT OF APPEALS DECISION WITH RESPECT TO TRIBAL STATUS IS CONSISTENT WITH WELL ESTABLISHED PRECEDENCE.

With regards to Circle, the Court of Appeals held that Circle is a federally recognized Indian tribe given the fact that Congress has recognized Circle's status in the Alaska Native Claims Settlement Act [43 USC § 1610(b)(1)], the Indian Self-Determination Act [25 USC § 450b(e)]; the Indian Financing Act [25 USC § 1452(c)]; and the Indian Child Welfare Act [25 USC § 1903(8)].

A tribe may exist in a de facto sense and have a legal existence independent of federal recognition. *Menominee Tribe v. United States*, 391 US 404 (1968). However, federal recognition is indicative of an ongoing government to government relationship between the tribe and the federal government and confers upon the tribe certain rights and privileges unique to tribal status. *id*. The long established rule of this Court has been that Congress has plenary authority over Indian affairs, *Wocester v. Georgia*,

31 US 515 (1832), and that this power extends to the province of recognition of tribal existence. *Montoya v. United States*, 180 US 261 (1901).

According to *Montoya* tribal recognition is not a wooden standard. A tribe is a body of Indians of the same race, united in a community under one leadership or government and inhabiting a particular territory. Generally, a pattern of Congressional and Executive action which recognizes this political relationship has been sufficient for the Courts to determine that Congress or the Executive branch has extended recognition to a particular tribe. *United States v. Sandoval*, 231 US 28 (1913). Recognition of a tribe by the federal government is a political act which is not generally subject to judicial review. *United States v. Rickert*, 188 US 432, 445 (1903); *Baker v. Carr*, 369 US 186 (1962). However, the Court has expressed a limit to Congress' power to define tribal status suggesting that this power may not be exercised in an arbitrary manner. *United States v. Sandoval, supra*, at 46; *See COHEN, HANDBOOK OF FEDERAL INDIAN LAW*, 5 (1982 ed.)

The Court of Appeals decision does not depart from these principles, but rather applies them to the uncontested facts of the case. There is no dispute that Congress has dealt with Circle as an Indian tribe in the statutes cited by the Circuit Court.

The Petitioner does not dispute that Circle is a community of Native people living in common association indicative of a tribe in a defacto sense nor does petitioner deny that Congress has dealt with Circle as an Indian tribe. Rather, petitioners express grave doubts as to

whether the tribe is recognized by the federal government within the meaning of 28 USC § 1362 based on two Ninth Circuit cases: *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985) and *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988). The Court of Appeals, however, correctly distinguished these decisions from this case.

In *Price*, the Court was faced with a situation where the Federal government had not extended any form of recognition, including the opportunity to organize under the IRA. As the Court noted, *Price* left open the question as to whether organization under a federal statute as a tribe was sufficient evidence of tribal status. *Price* does not stand for the notion that such organization standing alone is insufficient evidence of tribal status as suggested by petitioners. The case of Native Hawaiians is substantially different than Native Alaskans. As the Circuit Court noted, Circle was the subject of a settlement of aboriginal land claims in ANCSA. Only tribes may assert such claims. See *Oneida Indian Nation v. County of Oneida*, 414 US 661 (1974). The comparison of the two cases is simply a comparison of apples and oranges.

In *Venetie*, the Court was faced with uncertainty concerning the structure of the Native villages involved. *id.*, at 1387. There is no such similar confusion in the present case.

Neither *Venetie* nor *Price* hold that a judicial factual inquiry is required to determine tribal status in the face of a clear pattern of Congressional recognition and in the absence of uncertainty regarding the particular tribal

structure involved. To suggest otherwise as argued by petitioners deviates from established precedence.

II. THE CIRCUIT COURT'S DECISION RESPECTING THE STATE'S SOVEREIGN IMMUNITY CLOSELY FOLLOWS THE DECISION OF THIS COURT.

The Circuit Court held that the Eleventh Amendment does not bar suits by Indian tribes against states when the suit is brought under 28 USC § 1362, which is to say, where an Indian tribe is bringing suit upon a claim which might be brought by the federal government on behalf of the tribe. The Petitioner suggests a much broader interpretation of the case in an effort to secure this Court's review. Petitioner's claim that the Circuit Court's analysis broadly waives the State's Eleventh Amendment protection and may give rise to suits in admiralty and interstate commerce. If such were the case, the Petitioner would likely be correct in seeking review. However, the holding of the Circuit Court is much narrower than the extreme argument suggested by Petitioner and is on point with the holdings of this Court.

As the Circuit Court noted, this case involves an Indian tribe. Indian tribes occupy a unique niche in the fabric and history of American jurisprudence. As noted by the Court, the legal characterization of Indian tribes by this court has been a difficult and unique problem. As noted in *Cherokee Nation v. Georgia*, 30 US (5 Pet.) 1 (1831), Indian tribes are neither considered to be individual citizens, nor states of the Union, nor foreign states. Rather they are unique dependent states subject to the sovereignty of the United States, yet possessing the attributes

of a dependent sovereignty. As such they are independent of the sovereignty of the States in which they are found, being subject only to the plenary power of Congress to regulate commerce with them. *Wocester v. Georgia*, 31 US (6 Pet.) 515 (1832).

The Circuit Court's analysis is premised upon this unique legal niche occupied by Indian tribes and reflects a balance of tension necessarily experienced between the Constitutionally protected sovereignty of the States contained in the Eleventh Amendment and the plenary power of Congress over Indian affairs. Article 1, Section 8, U.S. CONST. This Court has often dealt with that tension, and provided guidance to the Circuits. In this case, the Circuit Court has closely followed the holding of this Court in *Moe v. Confederated Salish & Kootenai Tribes*, 425 US 463 (1976) which held that a statutory bar to suit against a state did not bar a suit against a tribe where the tribe brought a claim which could have been brought by the federal government on behalf of the tribe. Since the holding in *Moe*, the Courts have applied this logic to Eleventh Amendment cases. *Oneida Indian Nation v. New York*, 691 F.2d 1070 (2d Cir. 1982).

Contrary to the characterization suggested by Petitioner, the Circuit Court's holding does not rest upon the proposition that the State waived its immunity to a wide variety of suits upon entry into the Union. Rather, the logic of the opinion rests upon the unquestioned maxim of law that the State surrendered its authority over Indian affairs to the plenary power of Congress upon entry into the Union. The Petitioner suggests that the Circuit Court's opinion "turns the real balance of federalism upside down" (Petition at 11). On the contrary, as the

Circuit Court noted, the balance was struck in 1789 in favor of Congress's plenary power over Indian affairs in derogation of any such power which may be asserted by the various states. *Native Village of Noatak v. Hoffman, supra*, at 1501.

The case represents a narrow holding respecting suits brought by Indian tribes under 28 USC § 1362 and follows closely this Court's logic in *Moe*. The suggestions of a broader application are simply in error. The case does not represent a departure from established legal principles and does not warrant this Court's review on this issue.

III. RACIAL DISCRIMINATION AND THE STATUS OF AN INDIAN TRIBE RAISE FEDERAL QUESTIONS.

The tribe alleged racial discrimination and a failure to accord a legal status to the tribe derived from federal law as the cause of action. The Circuit Court found that both allegations raised a federal question

With regard to the discrimination claim, Petitioners argue that no discrimination could have occurred because the State was attempting to avoid discrimination by treating similarly situated communities alike. While the argument may be clever, it masks discrimination which is designed to strip a people of their legal rights based upon the group's racial characterization. The fundamental point in this case is that Indian tribes are political entities, not racial clubs *Morton v. Mancari*, 417 US 535 (1974). The attempt to deny or reduce benefits by incorrectly characterizing the tribe based upon the racial character of its

membership is racially based discrimination. The claim that racial discrimination occurred clearly raises a federal question. *Washington v. Seattle School Dist.* No.1, 458 US 457 (1982).

Moreover the question of the tribe's status under federal law is clearly a federal law issue. While the benefit arose out of state law, the benefit was premised upon the tribe's status under federal law. The issue, therefore, is truly a question of mixed federal and state law. In *Three Affiliated Tribes v. Wold Engineering*, 467 US 138, 157 (1984) this Court considered the question as to the validity of a state statute which required a tribe to waive its sovereign immunity as a precondition to access to state courts. In *Wold*, the Court noted that in the situation where a state law interpretation rests upon an incorrect perception of federal law, a federal question is raised. The issue is the same in this case. The Petitioner's understanding of the status of the tribe is a question of federal law, which has been incorrectly perceived by the Petitioner. Under *Wold* it is clear that a federal question arises because in this case it is alleged that the State action rests upon an incorrect understanding of the underlying federal law. This case is not a matter of pure state law, as claimed by Petitioner. Rather, the legal characterization of the tribal status is purely a matter of federal law. Consequently, the case raises a federal question.

IV. THE PETITIONER OVERSTATES THE IMPACT OF THE DECISION.

Petitioner argues that the case represents a substantial invasion of the State's Eleventh Amendment protections and changes the rules respecting the determinations

of tribal status in America. These are obvious overstatements of the impacts of this decision.

As to the Eleventh Amendment, the case only applies to suits brought be Indian tribes, which have traditionally been allowed in the federal courts, *supra*. As to the question of tribal status, this case applies to the tribes of Alaska governed by ANCSA. Further it follows the common rules respecting tribal recognition in the other states. In neither case, has the Circuit Court expanded upon prior decisions.

CONCLUSION

The Circuit Court correctly decided the case below and the opinion does not present substantial issues of federal law. The Native Village of Circle, therefore, respectfully requests that the Court deny the petition.

Respectfully submitted,

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July 16, 1990

APPENDIX A

PRINCIPAL CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 8, Clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

The Eleventh Amendment to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602(c)) states:

28 U.S.C. § 1362 states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

A.S. 29.89.050. State aid to Native village governments. The state shall pay $25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, "Native village government" means

(1) a local governing body organized by authority of the Act of congress of 25 U.S.C. 476 (the Act of Congress of June 18, 1934)

(2) a traditional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village, which meets the requirements of 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act). (§ 3 ch 155 SLA 1980)